IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 1035 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE KUNDAN SINGH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

JAGDISCHANDRA N VYAS

Versus

STATE OF GUJARAT

Appearance:

MR KV SHELAT for Petitioner No. 1
MR BY MANKAD AGP for Respondents.

CORAM : MR.JUSTICE KUNDAN SINGH

Date of decision: 12/12/2001

ORAL JUDGEMENT

By means of this petition the petitioner has prayed to issue a writ of mandamus directing the respondents to treat the petitioner as entitled to yearly increments and to pay the differences in salary on the basis that he was entitled and was granted the above

increments on due dates and for further directions to the respondents to consider the petitioner for promotion in disregard of the fact that the petitioner was suspended more than 10 years back and also directing the respondents to pay the petitioner as if promoted, from the date on which, the person next in the seniority list to him was promoted i.e. from 1972. Learned advocate for the petitioner orally submitted that the petitioner is not claiming difference in salary and all other benefits on the basis that he was promoted or any other increment amount or salary. The petitioner is seeking by means of this petition for direction to the respondents to give notional promotion from 1972 when his juniors were promoted in the year 1972 and amount of pension on that the basis if permissible from the date of retirement.

2 The petitioner joined as Forest Guard in 1953 and he was promoted to the post of Forester in the year 1955 with the State of Saurashtra and continued as the Forester in the State of Gujarat. The petitioner was suspended on certain allegations without issuing any charge sheet and he remained under suspension from 1968 to 2-5-1969. The petitioner filed Special Civil Application No. 1445/74 before this Court. Meanwhile, the petitioner was reinstated by the respondents. Hence, this Court directed the respondents to release the increments. The charge sheet was issued after a period of 8 or 9 years. The respondents did not consider the question of period of suspension which was illegal, unjust and unconstitutional and hence the same deserves to be quashed and set aside. It is also stated that Rule 152 of the B.C.S. Rules, shows that the Government servant who is suspended, when reinstated, the competent authority is bound to pass specific order, as to whether the period of suspension be treated as "on duty" or not. But no such order was passed by the authority concerned at the time when the petitioner was reinstated. It is also stated that in the month of August, 1972, the petitioner was due for promotion and he was selected for promotion but the result of that selection was kept under the sealed cover as the inquiry was contemplated against the petitioner though no charge was issued till that date. In fact, the charge was issued on 17-1-1975 and the departmental proceedings were ended and minor penalty of withholding one year increment permanently was awarded. Even then the petitioner was promoted as Range Forest Officer in the month of May, 1987. Hence, the petitioner applied for deemed date of promotion by his representation on 21-8-1987 and hence the petitioner. It is further submitted that by a letter dated 12-1-1988 the

Additional Chief Conservator of Forest of the Forest Department wrote a letter to the Secretary, Forest Department recommending for deemed date of promotion to the petitioner. The seniority list also shows that the petitioner was senior most and he was not given promotion though selected and promotion was not given because of pendency of the preliminary inquiry of the departmental proceedings and sealed cover procedure was adopted and the result of selection of the petitioner for promotion was kept in a sealed cover. Hence, the petitioner filed writ petition being Special Civil Application No. 56 of 1992 before this Court. Though that petition was rejected by this court on the ground that the petitioner's appeal was pending before the department concerned against the punishment of withholding of increment of one year permanently and the appeal proceedings were not finalised. Such appeal was pending before the Additional Chief Conservator of Forest, Gujarat State who decided the appeal of the petitioner on 16-5-1995 by the order by which earlier punishment of stoppage of one year increment permanently was quashed and set aside it was converted to stoppage of one year increment without any future effect. The petitioner made the representation on 18-7-1995 pointing out that the junior persons to the petitioners were promoted inspite of the specific B.C.R. Rules. It is also stated that though the petitioner was selected in the year 1972 the petitioner was promoted with effect from 29-4-1987 due to pendency of the departmental proceedings and ultimately the petitioner retired on 31-7-1989. It is further submitted that the charges made against the petitioner were flimsy. Hence, the respondents could not think it fit to award deterrent punishment. The petitioner was knowing the field work as well as forest work and there was no adverse remarks and nothing was adverse against the petitioner through out his field work. It is submitted that even in the cases where there is criminal prosecution against the Government servant, this Court has ordered to give provisional promotion. Whereas in the case of the present petitioner, only departmental inquiry was pending against the petitioner and the same was concluded within 18 years and therefore the petitioner should not be deprived of his promotion. The omission on the part of the respondents to promote the petitioner is arbitrary and capricious and therefore the same should be quashed and set aside. One Subbarao Annasaheb Jadav was prosecuted though the respondents granted promotion to him during pendency of criminal proceedings. There is an illegal discrimination under Article 14, 16 and 226 of the Constitution of India. The petitioner has been deprived of the benefits; (i) the

wages for the period of suspension not paid, (ii) stoppage of one increment with permanent effect and (iii) depriving of the promotion besides the petitioner's benefits regarding pension. As such, the punishment of withholding one year's increment permanently was quashed and set aside and it is the duty of the respondents to consider the deemed date of promotion of the petitioner in relation to the Range Forest Officer with effect from 5-8-1972.

3. No affidavit-in-reply has been filed by the respondents. Heard the learned counsel for the petitioner as well as learned A.G.P and perused the relevant papers on record.

4. The contention of the learned counsel for the petitioner is that in the year 1972 the order of suspension was passed on contemplation of the departmental inquiry though the preliminary inquiry was pending and charge was not issued against the petitioner. In the year 1972, the petitioner was selected for promotion and due to pendency of the departmental proceedings against the petitioner, the result of the petitioner was kept in the sealed cover. As the preliminary departmental inquiry was pending and charge was not issued to the petitioner till that date, the procedure of sealed cover adopted by the respondents was not justified and the same is illegal in view of the decision of the Supreme Court in the case of Union of India an others Vs. K.V. Jankiraman and others reported 1991 (4) SCC 109, wherein it has been held as under :

"On the first question, viz. as to when for the purpose of the sealed cover procedure, the disciplinary/criminal proceedings can be said to have commenced, the Full Bench of the Tribunal has held that it is only which a charge-memo in a disciplinary proceedings or a charge sheet in a criminal prosecution is issued to the employee that it can be said that the departmental proceedings/criminal prosecution is initiated against the employee. The sealed cover procedure is to be resorted to only after the charge memo/charge sheet is issued. The pendency of preliminary investigation prior to that stage will not be sufficient to enable the authorities to adopt the sealed cover procedure. We are in agreement with the Tribunal on this point. The contention advanced by the the learned counsel for the appellant-authorities that when there are serious allegations and it takes time to collect

necessary evidence to prepare and issue charge-memo/charge-sheet, it would not be in the interest of the purity of administration to reward the employee with a promotion, increment etc. does not impress us. The acceptance of this contention would result in injustice to the employees in many cases. As has been the experience so far, the preliminary investigation take an inordinate long time and particularly when they are initiated at the instance of the interested persons, they are kept pending deliberately. Many times they never result in the issue of any charge-memo/charge-sheet. If the allegations are serious and the authorities are keen in investigating them, ordinarily it should not take much time to collect the relevant evidence and finalise the charges. What is further, if the charges are that serious, the authorities have the power to suspend the employee under the relevant rules, and the suspension by itself permits a resort to the sealed cover procedure. The authorities thus are not without a remedy. It was then contended on behalf of the authorities that conclusions Nos. 1 and 4 of the Full Bench of the Tribunal are inconsistent with each other. Those conclusions are as follows : (ATC p. 196, para 39).

"(1) consideration for promotion, selection grade, crossing the efficiency bar or higher scale of pay cannot be withheld merely on the ground of pendency of a disciplinary or criminal proceedings against an official.

(2) " " " "

(3) " " " "

(4) the sealed cover procedure can be resorted to only after a charge memo is serve on the concerned official or the charge-sheet filed before criminal court an not before."

17. There is no doubt that there is a seeming contradiction between the two conclusions. But read harmoniously, and that is what the Full Bench has intended, the two conclusions can be reconciled with each other. The conclusion No. 1 should be read to mean that the promotion etc. cannot be withheld merely because some

> disciplinary proceedings are pending against the employees. to deny the said benefit, they must be at the relevant time pending at stage when charge-memo/charge-sheet has already been issued to the employee. Thus, read, there is no inconsistency in the two conclusions."

5. Even the punishment of withholding of one increment of year permanently was awarded to the petitioner and the petitioner was promoted to the next higher post/grade in the month of May, 1987 though the petitioner was entitled to the promotion to the higher post/grade with effect from 5-8-1972 when the other juniors to the petitioner were promoted to the higher grade/post and therefore petitioner ought to have been promoted to the higher post/grade with effect from 5-8-1972. Thereafter, the petitioner was retired in the year 1989. The petitioner also filed an appeal before the department and in that appeal the appellate authority quashed and set aside the order of minor punishment of withholding of one year increment permanently and increment of one year was stopped and that was released in the next year. Thus, it is a punishment under aforesaid Rules but it gives no effect regarding financial position as the petitioner has not suffered any financial loss. Therefore, the petitioner is not claiming back wages from deemed date of 1972 till the date of retirement of the petitioner along with the difference of pay etc. Learned counsel for the petitioner requested this Court that in case the petitioner is given notional deemed date of promotion with effect from 5-8-1972 there may not be any disturbance or interference with the service of any others junior employees who have been promoted since 1972 and the petitioner is not claiming any past difference in salary on the basis of notional deemed date of promotion. But the petitioner is claiming only notional deemed date of promotion with effect from 5-8-1972 and hence the petitioner be given benefit of higher pension amount only.

6. I have carefully considered the contentions of the learned counsel for the parties. This Court cannot direct the respondents to give deemed date of promotion to the petitioner with effect from 5-8-1972 and to pay to the petitioner higher amount of pension after retirement. This can only be considered by the State Government.

7. In the facts and circumstances of this case, it is desirable that the petitioner may file a fresh representation before State Government to consider and

give deemed of promotion with effect from 5-8-1972 when the other juniors to the petitioner were promoted to the higher post-grade. Therefore, the sealed cover procedure adopted by the Selection Committee in the year 1972 was erroneous and illegal and in view of the rule laid down by the Supreme Court in the decision referred to hereinabove. As instead of punishment of withholding of one year increment for one year permanently was awarded. The petitioner was promoted to the higher post/grade in the year 1987 though he was entitled to get promotion to the higher post/grade with effect from 5-8-1972 when junior employees to the petitioners were promoted and that punishment of withholding of one year increment permanently was quashed and set aside by the appellate authority in the year 1995 and it was moulded to lesser punishment of stoppage one year increment temporary without any future effect.

8. In the facts and circumstances of this case and considering the material on record and the submissions made by the learned counsel for the parties, this petitioner is being disposed of with a direction to the petitioner to make afresh representation within six weeks from today to the State Government to give notional deemed date of promotion with effect from 5-8-1972 and to give notional promotion to the petitioner with effect from 5-8-1972 if the petitioner entitled to the same and to pay higher amount of pension after retirement of the petitioner. In case the petitioner makes such representation to the State Government within the stipulated time, the State Government is directed to consider and decide the representation of the petitioner in accordance with law as well as in light of the above observations and findings made in this judgment, within a period of three months from the date of presentation of a certified copy of this judgment. Rule is made absolute to the aforesaid extent, with no order as to costs.

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/JVSatwara/